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No. 636448 I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

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MICHAEL GRASSMEUCK, INC., Appellant

Versus

TIMOTHY McSHANE, Respondent

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# RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### A. Table of Cases

**Federal Cases**

*SUPREME COURT*



*DISTRICT COURT*



**Washington Cases**

*SUPREME COURT*

**B. Table of Statutes**

**Federal Statutes**



**Washington Statutes**



## C. Table of Court Rules

**Washington Court Rules**



**Rules of Appellate Procedure**



## APPENDIX

## A. Cross-Assignment Of Error

Whether the trial court erred in its April 2009 order denying respondent's motion to vacate the judgment based on a failure of service and, assuming there was service, the default was entered by excusable neglect ?

## B. Issues Related To Cross-Assignment Of Error

1. Whether appellant's "proof of service" asserting only that he delivered a copy of the summons and complaint to an unnamed and unknown person at the apartment of respondent is sufficient proof of service on its face.

2. Whether, assuming appellant's proof of service was sufficient on its face, respondent's uncontested evidence that he was never served, the only other people who resided with him were his 5 and 7 year old children, and the only adult ever present in the apartment was his brother who never resided there, was sufficient to demonstrate a lack of service.

3. Whether, assuming service was proven the court erred in not vacating the default order and judgment when Mr. McShane articulated a meritorious defense, demonstrated excusable neglect in the default being entered, and plaintiff engaged in misconduct to obtain the order and judgment.

4. Whether, even if service was perfected against Tim McShane, because at time of alleged service Mr. McShane was separated from and not living with his wife Mrs. Julie McShane, service was effective as against Julie McShane.

## C. Issues Related To Appellant's Assignments Of Error

1. Whether a judgment is not simply voidable but is void if entered in favor of a person that is not the real party in interest ?

2. Whether after final judgment has been entered may a person substitute them self as the real party in interest

without first moving the court to reopen the pleadings, no record is presented demonstrating the pleadings should be reopened, and no findings or order reopening the pleadings is made ?

## D. Overview

### 1. Issues Raised By Appellant's Assignments Of Error

The Trustee starts his brief with a materially inaccurate assertion; namely, that the Trial Court on October 13, 2008 granted his motion to be substituted as the "real party in interest." (Appellant's brief, p. 2). That is half correct, but the missing half demonstrates the error of the Trustee's assertion.

When the issue of proper service of respondent was raised, Ms. Melnik was clearly not the party in interest and it was appropriate that "someone" should be able to respond to Mr. McShane's motions. Thus, the Trial Court allowed the Trustee to substitute into the case to respond to the motions but made it clear that it was not deciding whether that substitution "related back" to before the default order and judgment were taken. (Appendix, p. 9). In other words, although the Trial Court was going to allow the Trustee to have a voice in the motions then pending (because Ms. Melnik clearly could not) whether that would be effective to substitute the Trustee into the default order and judgment was reserved.

Thus, it is not well placed for the Trustee to not simply argue but heavily rely that Mr. McShane "waived" the issue of substitution. It was appropriate that the Trial Court allowed the Trustee to respond to Mr. McShane's motions. Even Mr. McShane recognized the fairness in allowing the Trustee to respond – Ms. Melnik clearly could not.

However, it is more than a little ungrateful – and entirely incorrect - for the Trustee, being allowed the shield of being given a voice on the motions to wield the granting of that voice as a sword arguing it constituted a waiver of the issue that was clearly in the minds of both the Trial Court and Mr. McShane: whether the Trustee could cure the defective judgment entered in the name of a person not the party in interest.

Ms. Melnik's judgment was properly vacated. After her cause of action arose (a slip and fall), but before judgment was entered, Ms. Melnik filed Chapter 7 Bankruptcy and did not disclose to the Trustee the asset of her cause of action against Mr. McShane. When Ms. Melnik's default order – and later judgment – were entered, that "asset" belonged to the Bankruptcy Trustee. Judgment was entered in favor of Ms. Melnik but she was not the real party in interest.

Thus, the judgment was not simply voidable, it was void, having been entered in favor of a person not the real party in interest.

Although the Trustee had standing to pursue Ms. Melnik's claim as an asset of the Bankruptcy estate, he took the claim – then reduced to judgment – with all of the same defects and defenses as though the claim was still held by Ms. Melnik. The only thing Ms. Melnik had was a defective, void judgment entered in favor of a person not the real party in interest. The Trustee never sought to reopen the pleadings to amend them. Instead, putting the cart before the horse, the Trustee attempted to substitute into the case first. Thus, on Mr. McShane's motion the court properly vacated the order entered in favor of a person not a party in interest, and dismissed the case.

**2. Issues Raised By Respondent's Cross-Appeal**

This court need not reach the issues raised by Mr. McShane's cross-appeal if this court finds the assignments of error raised by the Trustee are without merit. However, if Mr. McShane's cross-appeal is considered, the following points are noted.

Ms. Melnik's declaration of service was deficient on its face. It did not identify the person served. It was an improper basis to enter first the default order and later the default judgment.

Furthermore, as a challenge to service, Mr. McShane demonstrated without contradiction that he was not served and that the only other people that resided therein where his five and seven year old children. The only

other adult male that was ever present at his residence was his brother – and he did not reside there.

The Trial Court erred by not setting aside the default order and judgment in light of the meritorious defense articulated by Mr. McShane.

Finally, it was undisputed Mr. McShane was separated from his wife at the time of the attempted service. There was no service to enter a default judgment.

Therefore, even if the Trustee's assignments of error are found to have merit, the trial court's vacating the default order and judgment, and dismissal of the case should be affirmed for lack of personal service. And if not that, at the very least the default order and judgment should be vacated and the case remanded for further proceedings.

**E. Facts**

For the most part, Mr. McShane does not dispute the procedural history of motion practice set forth by the Trustee. Where inaccuracies exist, and there are several, they will be addressed below.

This lawsuit arises out of an alleged slip and fall that was alleged by Ms. Joan Melnik to have taken place on June 15, 2002 on the property of Mr. Timothy McShane. (CP 88, Dec. of McShane, para. 3).

After Ms. Melnik advised of her intention to make a claim (not by way of a lawsuit or summons but merely informally), Mr. McShane

immediately advised his carrier, State Farm, of the potential loss. (CP 88, Dec. of Mcshane, para. 4, CP 96, Dec. of Hershgold, para. 4). Despite repeated requests by State Farm, Ms. Melnik would not meet with the carrier or give a statement to advise what happened and thus on May 18, 2004 the carrier closed the claim. (CP 96, Dec. of Hershgold, para. 6). Nothing more was heard. Id.

On June 13, 2005 – two days before the statute of limitations was set to expire – plaintiff filed her lawsuit in King County. (CP 199, Summons face page). The declaration of service attested only that the summons and complaint were given to an adult male at the apartment of Mr. McShane – allegedly on August 22, 2005. No name of the alleged servee was provided. (CP 61, Dec. of Service).

The declaration of service was thus deficient on its face.

Taking it at face value, the proof of service did not attest who was served nor was there any factual basis to ascertain whether the adult who allegedly took the summons actually resided therein.

Despite that, on November 2, 2005 Ms. Melnik obtained an order of default. (Appendix, p. 1, Order of default).

Based on the order of default, on August 4, 2006 Ms. Melnik obtained an order of default judgment. (Appendix, p. 2-3, Default Judgment).

Mr. McShane's first notice of anything relating to this lawsuit was on February 4, 2008 when he was served with a notice to attend a post judgment deposition for the purpose of collection. (CP 89, Dec. of McShane, para. 11).

Reconstructing later what happened, it was learned that plaintiff filed for Chapter 7 Bankruptcy in the state of Oregon on June 11, 2003. (CP 73-86, Melnik Bankruptcy Petition). That is one year after the alleged slip and fall of June 15, 2002. She did not disclose the asset of her cause of action on her Bankruptcy schedules. (CP 79-86, Melnik Bankruptcy Schedules). The Bankruptcy was discharged on July 17, 2005. (CP 71, Bankruptcy Discharge Order). She allegedly served Mr. McShane with her lawsuit on August 22, 2005. (CP 61, Dec. of Service). Her intention to defraud the Bankruptcy Court is fairly clear.

Initially, Mr. McShane filed a motion in the trial court to vacate the default motion on the theory of judicial estoppel, arguing Ms. Melnik was barred from asserting a civil cause of action she did not disclose as an asset in the context of her Bankruptcy filing.[1] (CP 42-55, Motion To Vacate).

Mr. McShane also moved to set aside the default order and judgment for failure of personal service. Id. It was uncontested below

[1] Mr. McShane also sought to enforce a CR 2A stipulation. That matter is not presently before this court.

that Mr. McShane was the only adult male that resided in his abode at the time service was allegedly attempted. (CP 87-91, Dec. of McShane). The only people living with him were his five and seven year old children. Id. Occasionally his brother would visit, but his brother did not reside in the abode. Id.

It is notable that the default order and judgment were entered against both Mr. and Mrs. McShane. (Appendix, p. 1-3). However, at the time service was allegedly attempted it is undisputed the McShanes were separated and living separate and apart. (CP 88-89, Dec. of McShane, paras. 6-8; CP 92-94, Dec. of Julie McShane). There was simply no basis, in law or fact, to enter any order against her.

In addition to the foregoing motions, Mr. McShane also moved to vacate the default order and judgment as they were not entered in favor of the correct party in interest and were therefore void. (CP 125-138, Defendant McShane's Supplemental Motion To Vacate Default).

The trial court denied the first two motions but granted the third. This appeal followed.

## F. The Trial Court Did Not Err When It Vacated The Default Order And Judgment As Void

### 1. STANDARD OF REVIEW

A Trial Court's decision to set aside a default judgment is reviewed for an abuse of discretion. Allstate Ins. Co v. Khani, 75 Wn.App. 317, 323 (1994). Furthermore, an order granting a motion to vacate must be viewed with less scrutiny than an order denying such a motion. Yeck v. Dept. of Labor and Industries, 27 Wn.2d 92 (1947). Default judgments are to be set aside "liberally." Mortin v. Burris, 160 Wn.2d 745 (2007).

### 2. A DEFAULT ORDER AND JUDGMENT NOT ENTERED IN FAVOR OF THE REAL PARTY IN INTEREST IS VOID

A judgment entered when the court is without personal or subject matter jurisdiction is not simply voidable, it is void:

> Under such circumstances, the trial court *must* vacate that judgment and has no discretion to do otherwise.

Allstate. at 326-327. (italics in original).

Because a default order and/or default judgment entered without jurisdiction is a legal nullity, an order without effect, an adverse party may make a motion at any time to set it aside:

> ...[A] court has a nondiscretionary duty to vacate a void judgment. A motion to vacate

> under CR 60(b)(5) may be brought at any time. Motions to vacate under CR 60(b)(5) are not barred by the 'reasonable time' or the 1-year requirement of CR 60(b). Void judgments may be vacated regardless of the lapse of time. Consequently, not even the doctrine of laches bars a party from attacking a void judgment.

Id. (internal citations omitted).

Underscoring that time is not an issue, Allstate cited with approval Brenner v. Port of Bellingham, 53 Wn.App. 182, 188 (1989) that vacated a 16 year old judgment that was void for lack of jurisdiction.

### 3. A DEBTOR IN BANKRUPTCY IS NOT THE REAL PARTY IN INTEREST TO PROSECUTE A CIVIL CLAIM

Filing a Bankruptcy petition creates a legal estate in favor of the Bankruptcy Trustee comprised of all of the debtor's property as of the filing of the petition. See 11 USC 541(a).

A cause of action that accrued before the Bankruptcy petition was filed belongs to the Bankruptcy estate. Stoll v. Quintanar, 252 B.R. 492, 495 (BAP 9th Cir. 2000). Thus, once Bankruptcy is initiated, "only a Trustee may pursue a cause of action belonging to the Bankruptcy estate." Id. And notably for the case at bar, a cause of action not disclosed in the Bankruptcy schedules by the debtor remains an asset of the Bankruptcy

estate even after those proceedings have been closed and the Bankruptcy discharged. Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001).

Because a debtor's cause of action belongs to the Bankruptcy estate, the debtor is not the party in interest to bring the cause of action and cannot prosecute the claim. Sprague v. Sysco Corp., 97 Wn.App. 169, 172 (1999). Consistent with Cusano, supra., the debtor's party in interest status is not restored by the closure of Bankruptcy:

> ...[A] discharged debtor lacks legal capacity to subsequently assert title to and pursue an unscheduled claim simply because a trustee, without knowledge of the claim, took no action with respect to it.

Linklater v. Johnson, 53 Wn.App. 567, 570 (1989).

**4. A BANKRUPTCY TRUSTEE HAS NO GREATER RIGHT IN A CAUSE OF ACTION THAN THE DEBTOR**

It is important to note Mr. McShane does not contend the doctrine of judicial estoppel bars the Bankruptcy Trustee's pursuit of Ms. Melnik's claim. It is acknowledged Washington has determined a Trustee is not judicially estopped by the debtor's Schedule.

Instead, it is Mr. McShane's position – and the law is clear – that a Trustee pursuing a debtor's claim has no great right in the claim than what the debtor had:

> The trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been asserted against the bankrupt but for the filing of the petition.

Bank of Marin v. England, 385 U.S. 99, 101, 87 S.Ct. 274, 276 (1966); see also In re Cummings, 266 B.R. 138, 144 (Bankr. N.D. Ohio 2001) ("it is black-letter law that a Bankruptcy Trustee generally cannot acquire a greater interest in property than what was held by the debtor upon the commencement of a bankruptcy case").

As such, although the Trustee has the right to pick up the baton of Ms. Melnik's claim, he does so subject to all of the same defenses and defects as though prosecuted by Ms. Melnik herself. Marin, supra.

**5. THE REAL PARTY IN INTEREST MAY NOT BE SUBSTITUTED IN A CASE AFTER ENTRY OF DEFAULT OR FINAL JUDGMENT WITHOUT DEMONSTRATING A BASIS TO REOPEN THE PLEADINGS**

As a general rule, pleadings may not be amended after entry of final judgment – even if the amendment is only to name the correct the party in interest. Rose v. Fritz, 104 Wn. App. 116 (2001).

In Rose, the plaintiff brought suit on behalf of his wife's estate in his individual capacity without being appointed the estate's personal representative. Id. at 118. After the case was dismissed on summary judgment because the husband was not the party in interest, the husband

obtained an order appointing himself as the personal representative and sought to amend the complaint substituting himself as the PR of the estate. Id. at 118-119.

The Trial Court in Rose "set aside the judgment and reinstated the action" to allow the husband to name himself in his PR capacity as the party in interest. Id. at 119. The Court of Appeals reversed. Id.

Rose noted that after entry of final judgment, the pleadings may be reopened "only if authorized by statute or court rule." Id. at 120. Absent a sufficient showing by the moving party supported by findings to that effect, the judgment remains final and may not be corrected. See id. at 121.

Rose is consistent with case law going back as early as 1909 when the Washington Supreme Court held "under our liberal rule of pleadings, a party is ordinarily entitled to amend a pleading at any time *before* judgment." Spokane Valley Land & Water v. Arthur D. Junes & Co., 53 Wash. 37 (1909) (emphasis added). In Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438 (1967), the Court reinforced this rule and held that *before* entry of judgment, the trial court has discretion to allow defendants to amend their cross-complaints. Id. at 445.

Sprague, supra. specifically addressed this issue in the context of a Bankruptcy Trustee attempting to substitute as the real party in interest. In

Sprague, the defendant moved for dismissal because, as in the case at bar, the plaintiff/debtor sued individually – not the Trustee. Id. Before judgment was entered (but after the statute of limitations expired on the claim), motion was made to substitute the Trustee as the real party in interest. Id. The trial court denied that motion and dismissed the case. Id. The Court of Appeals reversed and allowed the substitution to "relate back" to the original filing of the complaint. Id. at 179-180.

Defendant herein agrees that was the correct result; consistent with Rose, the debtor/plaintiff in Sprague would have been entitled to amend the complaint when the Trustee sought to amend because final judgment was not yet entered. See Rose, supra. at 120. However, had the attempt been made after judgment was entered, the result in Sprague would certainly have been different. See Rose.

In this case, the Trustee's failure to properly move to reopen the pleadings is a fatal flaw. Rose held a Trial Court may do so upon motion if authorized by Civil Rule or statute. The Trustee not making the request is procedurally no different than the plaintiff in Rose failing to substantiate a basis for such a request and must lead to the same result: the pleadings remain in effect as pled. Rose, 104 Wn.App. at 111.

Because the Trustee failed to seek leave to reopen the pleadings, Mr. McShane will not address whether such a request could have been

granted. The issue was not raised below, there is no assignment of error, the issue was not briefed by the Trustee, and Mr. McShane has never had an opportunity to respond and make a record to such a request. As such, it is not an appropriate issue for this court to consider. RAP 2.4(b).

The merits of the dismissal must rise or fall on the pleadings as extant, which are: (1) final judgment, (2) entered in favor of someone not the party in interest, and (3) closed pleadings.

### 6. JUDGMENT ENTERED IN FAVOR OF A PERSON NOT THE PARTY IN INTEREST IS A LEGAL NULLITY – THE JUDGMENT MUST BE VACATED AND THE CASE DISMISSED

A Trial Court, confronted with a void judgment entered in the name of a person not the party in interest, must next determine what to do about it.

CR 17 requires that "every action shall be prosecuted in the name of the real party in interest..."[2]

Although dismissal is not an appropriate conclusion if it is possible to correct the error of not naming the real party in interest, (for example, if a motion to amend is before judgment is entered) dismissal is the only appropriate procedural response when the correction may not be made.

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[2] In candor to the court, it must also be acknowledged that CR 17 continues by stating a case should not fail for want of the correct party in interest and that leave to amend should be given to correct such a defect. Those safeguards might have been available to the Trustee in this case, but as the Trustee failed to substantiate a basis to reopen the pleadings, the point is moot.

See Rinke v. Johns-Manville Corp, 47 Wn.App. 222, 227 – 228 (1987).

See also Rose, supra.

> CR 17(a) provides that every action shall be brought in the name of the real party in interest. Under this rule, an action may be brought only by the person who is entitled to enforce the right. The civil rules do not contain a specific procedure for raising an objection that the plaintiff is not the real party in interest, nor do they indicate when the challenge should be made. However, since the objection is in the nature of a defense, it is properly the basis of a CR 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Dennis v. Heggen, 35 Wn.App. 432, 434 (1983).

### 7. IT WAS NOT ERROR FOR THE TRIAL COURT TO DISMISS THE CASE

The very nature of the Trustee's argument concedes the final judgment was not entered in the name of the real party in interest. Clearly, Ms. Melnik's cause of action was an asset of the Bankruptcy Trustee. Stoll, 252 BR at 495. As such, only the Trustee was the real party in interest. Id. That remains true even though the cause of action was not disclosed on Ms. Melnik's Bankruptcy schedules and the Bankruptcy proceedings were subsequently closed. Cusano, supra.

Thus, it is undisputed final judgment was entered in the name of a person not the real party in interest. The court never acquired personal jurisdiction over the correct parties to the controversy.

CR 59 and 60, as well as statute, give rise to very limited and narrow circumstances where the pleadings may be reopened after entry of final judgment. Rose, 104 Wn. App. at 120. However, in this case the Trustee never made that request. The Trustee, like the real party in interest in Rose, never made a showing that the pleadings should be reopened.

Instead, without first demonstrating why the pleadings should be reopened, the Trustee did the metaphorical equivalent of a gang-rush of the case: seeking substitution while the doors to the case (the pleadings) were still closed.

Thus the Trustee, although undisputedly the real party in interest, never having sought to reopen the pleadings, finds itself in the same position as the real party in interest in Rose.

The Trial Court in Rose was reversed for allowing the real party in interest to do exactly what the Bankruptcy Trustee attempted to do in this case: substitution to correct the real party in interest defect with no basis to first reopen the pleadings. This case thus does not present a close

question; unlike in Rose, the Trial Court in this case properly dismissed the case.

This result is compelled by the Trustee taking the action subject to all of the defects and defenses as though the claim was still being prosecuted by the debtor Ms. Melnik. Bank of Marin, 385 US at 101, 87 S.Ct. at 276.

The Trustee took possession of a judgment entered in the name of Ms. Melnik, who was not the real party in interest, with pleadings closed and no showing of why they should be reopened. Under that scenario, dismissal was the only appropriate remedy. Heggen, 35 Wn.App. at 434.

In the Trial Court and in his brief here, the Trustee argues his right of action should "relate back" to the original complaint. He makes this argument, no doubt, because the statute of limitations has run and he cannot refile the claim.

An argument of relation back puts the cart before the horse.

To narrow the issues, Mr. McShane readily concedes that if the Trustee had timely brought a motion to reopen the pleadings, found an appropriate basis under the Civil Rules or statute to do so, and made a factual showing sufficient to allow the trial court to rule that his delay in doing so earlier was "excusable," (see Rose), the pleadings might have

been reopened, and if so, the amendment could have been made, and that such an amendment would "relate back."

Here, however, absent the pleadings being reopened, there is "nothing" to "relate back" to. All there is, is a void judgment entered in the name of a person not the real party in interest and thus a case where jurisdiction never vested in the Trial Court over the proper parties.

In every case that could be found where substitution and naming of the correct party in interest was sought, it was done before a final judgment was entered. See Kommavongsa v. Haskell, 149 Wn.2d 288, 294 (2003); Beal v. Seattle, 134 Wn.2d 769, 774-775 (1998); and Sprague, 97 Wn. App. 169 (1999).

Based on those cases, (particularly Sprague as it involves a Trustee that appropriately sought substitution before entry of final judgment) it is conceded substitution may be sought after the statute has run, the amendment relates back, and is timely. But, again, that is when the amendment is sought before entry of final judgment and begs the question of whether when requested, the pleadings had been reopened. If the pleadings are closed, and there is no showing to reopen them, all that is left is a defective judgment.

The final issue is the Trustee's argument that Mr. McShane waived the question of substitution. That argument is not well placed for several reasons.

First, this is not an issue that may be waived. Instead, Rose is clear that the procedural milepost of entry of final judgment is a steel door that cannot be reopened by the incantation of the phrase "open sesame,"[3] or as uttered by the Trustee, "open for me, the real party in interest." Rose was clear there must be a legal basis to make the request and specific findings justifying the reopening of the pleadings first. Rose. Anything less and the pleadings remain closed and a void and defective judgment remains a void and defective judgment. Allstate, 75 Wn.App. at 326-327. To enforce such a judgment is as much an injury to the court and the process as the party against whom execution is sought.

Allstate is also clear that this is an issue that may be raised at any time. A court lacking jurisdiction always lacks jurisdiction. See id. A party cannot "waive" the court into having jurisdiction when it has none, as the Trustee urges took placed here. Proper initiation of a civil lawsuit is the fountainhead of a court's jurisdictional power. In this case, suit was initiated by a person with no right to file one, judgment was obtained by her under false pretenses, and still to date there has been no motion nor

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[3] Or as spelled in the original Ali Baba, "open simsim."

sufficient findings to reopen the pleadings to correct that defect. The court never obtained jurisdiction over the proper parties. Those are not defects that may be "waived."

Second, on the merits of the argument there was no waiver. When this issue arose, it was clear Ms. Melnik was not the correct party in interest to make any argument in this case. If anyone was, it was the Trustee. However, without some type of order, the Trustee could not simply unilaterally file motions or participate in the proceedings.

In acknowledgment of that, Mr. McShane agreed the Trustee should be allowed a voice and could substitute in name for Ms. Melnik. However, Mr. McShane reserved all objections and made it clear his agreement reached only the ability of the Trustee to make argument on motions that were being filed – not that it was a final substitution for all purposes as contemplated by Rose. (CP 206-212, Defendants' response to plaintiff's motion to substitute Bankruptcy trustee).

The Trial Court, making the same acknowledgment that clearly Ms. Melnik was not the correct party in interest and wanting to allow the Trustee a vehicle to raise his arguments, allowed the Trustee to "substitute" into the case but explicitly reserved the issue of "relation back." (Appendix, p. 9).

"Relation back" as used in that context is, at worse, an imprecise term – but the intention of the Court and Mr. McShane were clear: That the Trustee could make filings and have a stage to argue he should be able to pick up where Ms. Melnik left off, but that the Trial Court was not at that time ruling on the ultimate merits of whether the Trustee would be allowed to correct the party in interest defect to "relate back" to the original judgment. Clearly, and as is now stated several times, the Trustee had made no attempt to reopen the pleadings as required by Rose and the Trial Court entered no findings to justify such a request even if made.

Thus, although perhaps not the most precise word choice, the court's intention to reserve "relation back" is easily seen for exactly the concepts discussed in Rose as well as Sprague: could the Trustee correct the real party in interest defect in such a way as to allow him to continue with the default order and judgment. Once the Trial Court actually had that issue in front of it on the merits, it answered the question in the negative.

There was no wavier.

## G. The Trial Court Erred When It Denied Mr. McShane's Motion To Vacate On The Basis Of Lack Of Service

### 1. STANDARD OF REVIEW

It must be acknowledged that the standard of review on this issue is an abuse of discretion. Leen v. Demopolis, 62 Wash.App. 473, 478 (1991). Furthermore, that the person attacking a proof of service bears the burden of proof by a clear, cogent, and convincing evidence. Id.

However, while the standard of review may be high, it is not without limit:

> Courts, however, have a nondiscretionary duty to vacate void judgments.

Id. at 478.

### 2. A FAILURE OF PROOF OF SERVICE DEPRIVES THE TRIAL COURT OF JURISDICTION REQUIRING THE DEFAULT TO BE VACATED

Failure of proper service deprives the Trial Court of jurisdiction over the defendant. Vikich v. Anderson, 97 Wn.App. 684, 691 (1999); see also Woodruff v. Spence, 76 Wn.App. 207, 209 (1983). Upon a showing of a failure of proof of service the Trial Court has a nondiscretionary duty to vacate the judgment. Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323 (1994).

Because a failure of service deprives the Trial Court of jurisdiction, a request to set aside a default based on insufficient service is

not bound to a time requisite per se. Allstate Ins. Co., v. Khani, 75 Wn.App. 317, 877 P.2d 714 (1994) (judgment that is void for lack of service must be vacated regardless of the lapse in time). Similarly, a defendant need not demonstrate a "meritorious defense." Leen v. Demopolis, 62 Wash.App. 473, 477-78, 815 P.2d 269 (1991) (if a judgment is void, no showing of a meritorious defense is required to vacate the judgment).

### 3. A FAILURE OF SERVICE MAY BE DEMONSTRATED BY CREDIBLE EVIDENCE THE DEFENDANT WAS NOT SERVED

Although the party challenging service bears the burden of proof that service was not effected, the plaintiff bears the burden of demonstrating the prima facie elements of service:

> In a challenge to personal jurisdiction based on insufficient service of process, the plaintiff has the burden of proof to establish a prima facie case of proper service.

Gross v. Sunding, 139 Wn.App. 54, 60 (2007).

Furthermore, once a defendant presents credible evidence that service was not effected the plaintiff may not simply rely on the return of service's conclusions that service was effectuated:

> While the affidavit of service, regular in form and substance, is presumptively correct, the return is subject to attack and may be discredited by competent evidence.

> Affidavits sworn to by individuals purportedly served asserting that they were not in fact personally served are considered by the courts as competent evidence discrediting averments to the contrary in affidavits of service

Haberman v. Washington Public Power Supply System, 109 Wash.2d 107, 176 (1987). Haberman rejected plaintiff's argument that it could rely on the presumption that a proof of service is sufficient, in the face of defendants' declarations demonstrating they were not. Id.

### 4. THE REQUISITES OF PROVING PERSONAL OR ABODE SERVICE ARE CLEAR

A civil action is commenced by service of a copy of a summons together with a copy of the complaint. CR 3. RCW 4.28.080 describes at length how a summons may be served on a defendant. The statute allows substituted personal service on the defendant:

> . . .by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein. RCW 4.28.080(15).

Thus, the statute states three requirements for a valid substituted service of process: (1) the summons must be left at the defendant's "house of his or her usual abode"; (2) the summons must be left with a "person of suitable age and discretion"; and (3) the person with whom the summons is left must be "then resident therein."

"Even those unlearned in the law would most likely conclude a house of usual abode is somebody's home, even if only on a seasonal basis, and 'then resident therein' means a person who is actually living in that house at the time of the service of process." Salts v. Estes, 133 Wn.2d 160, 164 (1997). The Court in Wichert v. Cardwell, 117 Wn.2d 148 (1991), held that:

> . . .the legislative intent behind the substituted service statute was to provide due process, i.e., notice and the opportunity to be heard.

The requirements of "personal service" under CR 3 are clear and require no extended conversation: the summons and complaint must be actually handed to the defendant. See CR 3.

CR 4(g)(7) requires that for service other than publication, the return of service must state "the time, place, and manner of service."

### 5. THE TRIAL COURT ERRED WHEN IT DENIED MR. McSHANE'S MOTION TO VACATE THE DEFAULT ORDER AND JUDGMENT FOR LACK OF PROOF OF SERVICE

The return of service does not state that Mr. McShane was served. Instead, an unnamed adult who allegedly stated he lived therein was served. Absent proof that Mr. McShane was himself served – which not even the Trustee credibly asserts – if service took place it must be evaluated as substitute abode service.

Mr. McShane filed a credible declaration explaining that he was not served. (CP 88-90, Dec of McShane, paras. 7-12) He explained that only he and his two young children live in his secured, closed apartment building. Id. He further explained that the only adult that might be present in his apartment is his brother. Id. However, it was undisputed his brother did not reside in the apartment. Id.

In response, plaintiff presented evidence of nothing. Indeed, worse than nothing, it was undisputed the process server could not pick the person he allegedly served out of a line up and had no memory whatsoever of the alleged service. (CP 142-159, Dep. excerpts of Delys)

On its face the return of service states no facts that establish service on an adult residing therein. At best, it is only conclusions with no fact or substance. It is submitted that if that form of proof of service is held sufficient, proof of service is deemed a meaningless gesture. Without facts for the court to actually consider, the Trial Court is left to abdicate its roll to the process server – or the person allegedly served – to determine whether service was effected.

It is no large leap to consider a house guest will, when confronted by a person at the front door wielding papers demanding to know whether they live there, defend their presence in the home as lawful. It is a human reaction for a person in such a circumstance to defend their presence in the

house: "yes, I live here," would be a common response. It is not reasonable nor expected that a person in that situation would launch into a conversation of: "Well, I am in from out of town, I am heading to Poughkeepsie next week." Instead, they are looking to close the door as quickly as they can.

Blind reliance on a server's statement that either the server, or the person at the door, allegedly concluded that their presence in the structure constituted their "residence" is exactly that: blind reliance on no known facts. A 5 day house guest might well consider themselves "living there" – for 5 days, anyway. Yet clearly, that type of transient houseguest does not "live" there for the purpose of service. See Salts, supra. Thus, no weight may be placed on a process server's conclusion that when they asked that person, "do you live here," and the answer was "yes," that it meant they actually "resided" in the "abode" as required by case law. This risk is even greater when no name is obtained.

It is a perilous path the Courts walk, throwing due process to the wind, by simply accepting the types of conclusions contained in the server's return in this case as evidence of anything. This court is asked to give careful consideration to what are little more than "service mills" with servers serving hundreds of collection notices a week. This Court would

turn resolution of a fundamental concept due process, original service, to the determination of a process server with every incentive to gild the lily.

The initiation of litigation is a step of such enormous Constitutional and personal magnitude, it is submitted to be not too much to ask that a process server provide some actual facts demonstrating proper service. If a showing is made of evasion or refusal by the person to identify themselves, then such instances can be evaluated on a case by case basis. Provided sufficient corroborating facts are presented in the return, then perhaps "unnamed male" might be sufficient. Here, however, no showing of that was made – although the return of service indicates the summons was given to an "unnamed male," he did not even assert in the return that he bothered to ask the person's name. With such an utter lack of effort or showing, to simply accept the server's conclusions as service was error.

However, even if the return of service is considered "prima facie" evidence of service, it does not withstand the challenge of the clear, cogent, and convincing evidence of Mr. McShane that he was not served personally and that any adult that might have been in his unit did not reside therein.

Additional argument could be made, but it is not necessary. The failure of service deprived the Trial Court of jurisdiction in the case and it

had a non-discretionary duty to vacate the default order and judgment. Mr. McShane was not required to demonstrate a meritorious defense nor was he required to comply with the one year standard.

## H. The Trial Court Erred When It Refused To Set Aside The Default Order And Judgment In Light Of Mr. McShane's Meritorious Defense, His Excusable Neglect, And The Misconduct Of Plaintiff In Securing It

This issue is reached only if this Court finds the Trustee's issues persuasive and Mr. McShane's argument that service was not proven, unpersuasive.

Even with proper service, a Trial Court should set aside a default order and judgment if the following factors are demonstrated: (1) the existence of substantial evidence to support a defense to the claim asserted, (2) reason for the party's failure to timely appear, (3) party's diligence in asking for relief following notice of entry of the default, and (4) effect of vacating the judgment on the opposing party. White v. Holm, 73 Wn.2d 348, 352 438 P.2d 581 (1968).

> [T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted... What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Griggs v. Averback Realty, Inc., 92 Wn.2d 576, 582, 599 P.3d 1289 (1979).

The default order and judgment should be set aside.

Plaintiff alleges to have fallen on the property on June 15, 2002. Plaintiff specifically alleges that she caught her foot on a loose rock step located near the exterior patio of the residence and fell onto the rock patio surface. (Appendix, p. 5, Complaint). Plaintiff's claims include an alleged breach of the Washington Landlord Tenant Act (RLTA) due to this alleged defective condition with the rock steps. (Id.)

Proof of notice is required to trigger the duties under the RLTA. In Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973), the court held that all residential rental agreements contain an implied warranty of habitability. The rule of Foisy was codified in the RLTA, RCW 59.28.060. The RLTA "modified the common law so as to require a decent, safe and sanitary housing", and "adds . . . a covenant of repair" to residential rental agreements. O'Brien v. Detty, 19 Wn. App. 620, 621, 576 P.2d 1334, review denied, 90 Wn.2d 1020 (1978).

Importantly, the RLTA does not render a landlord strictly liable. Lincoln v. Farnkoff, 26 Wn. App. 717, 720, 613 P.2d 1212 (1980). Instead, RCW 59.18.060 speaks in terms of maintaining the demised premises in "reasonably good repair." The courts have held that, "no

violation occurs until a reasonable time after notice of the defect." Id. Stated differently, before the landlord can be held liable he must know or in the exercise of reasonable care should know of the existence of a condition which does not conform to the statutory requirements. O'Brien v. Detty, 19 Wn. App. 620, 621, 576 P.2d 1334 (1978).

Here, Ms. Melnik interacted with Mr. McShane's insurance company in excess of one year. (CP 96-102, Dec. of Hershgold). She was asked repeatedly to provide documentation to support her claims and submit to an oral statement as to what happened in order to support them. Id. She never did and there has never by her, either pre or post litigation, a showing of any evidence that Mr. McShane had any notice of defect – assuming one was even present – that would give rise to notice of a need to cure.

It is undisputed that as soon as Mr. McShane learned of the default order and judgment, by post judgment collection attempts, he immediately sought to set aside the default.

Finally, there is a substantial element of fraud and deception by plaintiff in procuring the orders. It is undisputed she fraudulently failed to disclose the asset of the cause of action on her Bankruptcy schedule. Had she timely disclosed the asset in her Bankruptcy, it is manifest that the Trustee would have made contact with State Farm in an attempt to settle

the claim to obtain funds to pay Ms. Melnik's creditors. Instead, she hid the claim, obtained the default through questionable service, and then laid in the weeds for approximately a year before attempting collection.

What is more, the amount of the default judgment itself is suspect. (Appendix, p. 2). No material showing was made by her below establishing an entitlement to a judgment in the amount of $600,000 for what on its best day appears to be a modest slip and fall injury, $49,000 of which was for interest for which there was clearly no legal entitlement to.

Even if all of the service and party in interest issues are ignored and are of no weight, a great injustice is done to allow this default order and judgment to stand. It was error for the Trial Court to not affirm this as an additional basis of the dismissal.

## I. The Trustee's Arguments About The Timeliness Of Mr. McShane's Motions Are Of No Weight

Candidly, and with no intention of being pejorative, Mr. McShane has great difficulty even tracking the argument of the Trustee. It appears the Trustee alleges either the cross-appeal was untimely or the motions below were untimely. Neither argument is worthy of weight.

First, as to the motions below, as cited above, if the Trial Court lacked jurisdiction it lacked jurisdiction. Always. Mr. McShane's motions in that regard could never be "late" because they could be filed at

any time. Whether the lack of jurisdiction was pointed out in a primary motion, a motion for reconsideration, or some other motion, jurisdiction is not conferred by an allegedly untimely motion. Either the court has jurisdiction or it does not.

This quality runs to two of the three basis of Mr. McShane argued below to vacate the default order and judgment. The only motion by Mr. McShane that could be impacted by the timing of the request is the third basis briefed herein: assuming service was valid, the default order and judgment should be set aside because the orders were entered because of excusable neglect and he has a meritorious defense.

At page 11 of his memo, the Trustee argues that the final default judgment is subject to RAP 2.2(a)(1) and therefore any appeal from it had to be taken within 30 days of its entry. The Trustee's argument misapprehends the procedural posture of the case.

First, originally "appeal" to the Court of Appeals was not sought of the default order and judgment. Instead, once the default order and judgment were discovered, Mr. McShane sought relief from the Trial Court to vacate them. That motion practice is not subject to the Rules of Appellate Procedure. That motion practice is subject to the Civil Rules as identified above regarding motions to vacate a default judgment.

Second, Mr. McShane did not file a notice of appeal, per se, at all. The Trustee filed a notice of appeal of the Trial Court's order vacating the default order and judgment. There is no legitimate argument to be made that Mr. McShane's cross-appeal was untimely as Mr. McShane's time to file a cross-appeal is calculated from the timing of the appeal filed by the Trustee, not any of the orders made below by the Trial Court.

At page 17 of his memorandum, the Trustee argues that an appeal from an order denying a motion to vacate a judgment is limited to the order denying the motion to vacate, and may not reach issues relating to the merits of the judgment itself. For support, the Trustee cites Bjurstrom v. Campbell, 27 Wn.App. 449 (1980). From this, the Trustee concludes at the bottom of page 18 of his memorandum that "the court lost jurisdiction after entry of the August 4, 2006 judgment to grant relief under CR 59." Again, candidly, Mr. McShane does not comprehend the argument being made. For the reasons set forth above, the motions in the Trial Court were timely and consistent with Allstate and other cases cited above.

At page 20 of his memorandum, the Trustee argues that "even if for the sake of argument respondent's CR 59 motion was timely, CR 59 does not permit a party finding a judgment unsatisfactory to suddenly propose a new theory of the case." Mr. McShane is at a loss to understand what the Trustee alleges is a "new theory of the case." Mr. McShane has

argued throughout that the default order and judgment are void for being entered in the name a person not the party in interest, there was a failure of service, and the default should be set aside because of his meritorious defense. These are not "new theories."

## J. There Was No Basis To Find Service Against Mr. McShane's Separated Wife

It was undisputed Mr. McShane was separated from, and living separate and apart from his wife at the time of alleged service. (CP 87-91, Dec. Tim McShane; CP 92-94, Dec of Julie McShane) The Trustee did not respond to this below nor in his brief here. This presents the "easiest" issue for the court on this appeal. They had clearly "renounced" their community. Nuss v. Nuss, 65 Wn.App. 334, 334 (1992). Even if service as to Mr. McShane was proper, it could not have been as against his separated spouse, not a resident in the abode.

## K. Conclusion

The Trustee's brief ignores several fundamental "gates" a person must pass through in order to amend the pleadings to correct the wrongful naming of the party in interest.

First, the Trustee's brief ignores the "gate" of final judgment. The law makes a clear distinction between seeking to amend pleadings after versus before final judgment is entered. When amendment is sought

before judgment is entered, leave to amend should be freely given and it is conceded (typically) any amendment would relate back to the original filing of the complaint. However, when final judgment is already entered a different "gate" must be used.

After final judgment is entered, a person must first pass through the "gate" of reopening the pleadings. After final judgment is entered, the pleadings are closed and amendment may be made only after the pleadings are reopened.

In this case, the Trustee ignored that distinction and asked to be named the party in interest without first moving to open the pleadings to allow the amendment in the first place. Rose is clear that is not permitted.

Had the Trustee first moved to open the pleadings, and assuming he could have articulated a legal basis to do so, his request might have been granted. Or it might not. At this stage, we will never know because the Trustee failed to make a record below. He may not be heard to make the argument for the first time in his reply brief.

Therefore, with no request to reopen the pleadings and clearly a person (Ms. Melnik) who was not the party in interest named in the judgment, the court acknowledged the default order and judgment were void and vacated both, and dismissed the case on a properly made motion to do so.

It is submitted this case is, indeed, that simple.

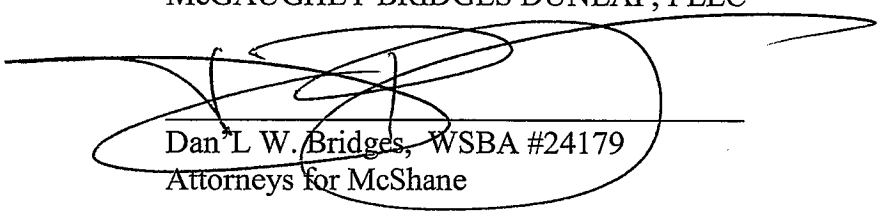
The Trustee's arguments of waiver are both factually without basis and legally impossible. Both Mr. McShane and the Trial Court clearly had a presence of mind that what was taking place was allowing the Trustee a chance to have a voice in the issues – not to correct the party in interest defect to "relate back" to the filing of the original complaint which might have been possible had the Trustee moved to first open the pleadings, second moved to amend the complaint.

The other issues in regard to Mr. McShane's challenges to service are clearly set forth above and do not require repetition here.

The Trial Court's order vacating the default order and judgment, and dismissal of the case, should be affirmed.

DATED this 19th day of October, 2009.

McGAUGHEY BRIDGES DUNLAP, PLLC



Dan L W. Bridges, WSBA #24179
Attorneys for McShane

# APPENDIX

FILED

2005 NOV -2 PM 3:57

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

EXPO1

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | |
|---|---|
| Joan Melnik, a single woman,<br><br>Plaintiff,<br><br>v.<br><br>Timothy C. McShane and Julie S. McShane, husband and wife and the marital community composed thereof,<br><br>Defendants. | NO. 05-2-19294-1SEA<br><br><br><br>ORDER OF DEFAULT |

THIS MATTER came on for hearing upon plaintiff's motion for an order of default. The court having reviewed the pleadings and the file herein.

The court finds that service of plaintiff's summons and complaint and order setting civil case schedule was duly and regularly made upon defendants Timothy C. McShane and Julie S. McShane, husband and wife and their marital community and that since the date of service defendants have failed to serve or file an answer or other responsive pleading, that the time provided by law for doing so has expired and this court is the proper venue for this case.

Now, therefore, it is hereby ORDERED that defendants Timothy C. McShane and Julie S. McShane, husband and wife and their marital community are in default in the above-entitled action.

DONE IN OPEN COURT this _____ day of November, 2005

CARLOS VELATEGUI
COURT COMMISSIONER
NOV 02 2005

COURT COMMISSIONER/JUDGE

PRESENTED BY:

Tim Callahan, WSBA #18490
Attorney for Plaintiff

Order of Default - 1

Tim Callahan, WSBA #18490
ATTORNEY AT LAW
600 1st Avenue-Suite 414
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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

EXP01

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | |
|---|---|
| Joan Melnik, a single woman,<br><br>Plaintiff,<br><br>v.<br><br>Timothy C. McShane and Julie S. McShane, husband and wife and the marital community composed thereof,<br><br>Defendants. | NO. 05-2-19294-1SEA<br><br>DEFAULT JUDGMENT |

JUDGMENT SUMMARY

1. Judgment Creditor: JOAN MELNIK, a single woman
2. Judgment Debtors: TIMOTHY C. MCSHANE and JULIE S. MCSHANE, husband and wife, and the marital community composed thereof,

| | |
|---|---|
| 3. Principal Judgment Amount: | $550,645.35 |
| 4. Interest to Date of Judgment: (Nov 3 2005 - Aug 4 2006) | $ 49,783.25 |
| 5. Attorney's Fees: | $ 0.00 |
| 6. Other Recovery Amounts: | $ 0.00 |

7. Principal Judgment Amount Shall Bear Interest at 12% per annum
8. Attorney Fees, Costs and Other Recovery Amounts Shall Bear Interest at 12% per annum,
9. Attorney for Judgment Creditor: Tim Callahan
600 1st Avenue - Suite 414
Seattle, WA 98104-2237

Tim Callahan, WSBA #18490
ATTORNEY AT LAW
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JUDGMENT

THIS MATTER coming on to be heard this day; plaintiff appearing by her attorney, Tim Callahan; and the court having made and entered an Order of Default on November 2, 2005, now therefore,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff be and is hereby awarded judgment against defendants in the sum of ~~$600,~~428.60.

JUDGE/COURT COMMISSIONER

Presented by:

By _____
Tim Callahan, WSBA #18490
Plaintiff Attorney

Order and Attachments approved
APR 04 2006
Kimberley Prochnau
Court Commissioner



Tim Callahan, WSBA #18490
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FILED

05 JUN 13 PM 4:02

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

Joan Melnik, a single woman,

Plaintiff,

v.

Timothy C. McShane and Julie S. McShane, husband and wife, and the marital community composed thereof,

Defendants.

NO. 05-2-19294-1SEA

COMPLAINT

MICHAEL C. HAYDEN

Plaintiff alleges:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff Joan Melnik is a resident of King County, Washington.

2. Defendants are residents of King County, Washington; defendants form a marital community and all acts or omissions are alleged to have been taken for the benefit of said marital community.

3. All acts and omissions alleged herein occurred in King County, Washington.

II. CLAIM

4. Defendants were plaintiff's landlord. The parties entered into a one (1) year residential lease agreement commencing December 13, 2001 for the property located at 8341 16th Avenue NW - Seattle, Washington. The lease agreement included paragraph 6. requiring plaintiff to mow and

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water the grass and keep the grass, lawn, flowers and shrubbery thereon in good order and condition.

5. The leased property included a backyard that was only accessible by a narrow pathway of uneven and loose rock steps with stair risers of varying heights and no handrail.

6. That on June 15, 2002, plaintiff while attempting to comply with the lease provision pertaining to yard maintenance caught her left foot on one of the loose rock steps and fell approximately 4 feet on to the the rock patio surface below the steps severely injuring her left foot and lumbar spine and that said injuries were a direct and proximate result of defendants' negligence and acts as alleged herein.

7. Plaintiff alleges that said steps constituted a dangerous condition and that defendants knew of this condition when a guest of the former tenant fell and severely injured her left foot on the same loose rock steps the prior year.

8. That defendants failed to repair or remedy this dangerous condition.

9. That defendants failed to disclosure to plaintiff prior to the commencement of the lease or any time thereafter - including a denial by defendant Timothy C. McShane to plaintiff after her fall - the existence of any prior fall on said steps and that such acts or omissions were fraudulent.

10. That the conditions of the steps violated the Seattle housing and building maintenance code for securing loose rocks in the landscaping steps and failing to install a handrail.

11. That failing to comply with such code provisions breached the Residential Landlord Tenant Act, RCW 59.18.

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12. That defendants failure to repair or disclose the dangerous condition of the steps to plaintiff was a direct and proximate cause of her injuries.

13. That as a result of defendants' conduct, acts and omissions, plaintiff Joan Melnik was injured, suffered and continues to suffer physical injury, chronic pain, emotional trauma, medical expenses, wage loss and loss of earning capacity including disability, and other damages to be proven at trial.

III. LIMITED PHYSICIAN/PATIENT WAIVER

14. Plaintiff hereby waives the physician-patient privilege ONLY to the extent required by RCW 5.60.060, as limited by the plaintiff's constitutional rights of privacy, contractual rights of privacy, and the ethical obligation of physicians and attorneys not to engage in exparte contact between a treating physician and the patient's legal adversaries.

IV. RELIEF REQUESTED

15. WHEREFORE, plaintiff prays for judgment against the defendants, jointly and severally, in an amount that will fairly compensate plaintiff for all damages sustained, costs and reasonable attorney's fees, interest calculated at the maximum amount allowable by law, and other relief the court deems just and proper.

DATED at Seattle, Washington, this 13TH day of June, 2005.

By: Tim Callahan

Tim Callahan WSBA #18490
Attorney for Plaintiff

Tim Callahan, WSBA #18490
ATTORNEY AT LAW
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

| | |
|---|---|
| MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,<br><br>Plaintiff,<br><br>vs.<br><br>TIMOTHY McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,<br><br>Defendants. | NO. 05-2-19294-1 SEA<br><br>ORDER GRANTING PLAINTIFF'S MOTIONS TO: (1) SUBSTITUTE BANKRUPTCY TRUSTEE AS REAL PARTY IN INTEREST; (2) AMEND THE CASE CAPTION; AND (3) STAY PROCEEDINGS TO PERMIT DISCOVERY<br><br>**(Clerk's Action Required – see * at page 3)** |

THIS MATTER came before the court on plaintiff Joan Melnik's motion to: (1) amend the complaint to substitute the Trustee (Michael A. Grassmueck, Inc.) in the place of plaintiff Joan Melnik as the real party interest in this lawsuit; (2) amend the case caption to substitute Michael A. Grassmueck, Inc. for Joan Melnik as the plaintiff; and (3) stay any hearing on defendant's motion to vacate the default judgment in this case for 90 days in order to permit discovery.

The court has considered the following:



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☑ Plaintiff' moving papers as follows:

A. Plaintiff Joan Melnik's Motions to: (1) Substitute Bankruptcy Trustee as Real Party in Interest; (2) Amend the Case Caption; and (3) Stay Proceedings to Permit Discovery;

B. Declaration of Tim Callahan in Support of Motions to: (1) Substitute Bankruptcy Trustee as the Plaintiff; (2) Amend the Case Caption; and (3) Stay Further Proceedings to Permit Discovery;

C. Declaration of Michael A. Grassmueck;

☐ Defendant's responsive pleadings as follows:

A. Defendant's Response to Plaintiff's Motion to Substitute Bankruptcy Trustee as Real Party in Interest;

B. Declaration of Timothy E. Allen

☐ Plaintiff's reply pleadings as follows:

Plaintiff Melnik's Reply Memorandum and Request for Terms

Based on the foregoing, and good cause appearing, it is hereby ORDERED as follows:

1. ~~The plaintiff is awarded $250.00 in KCLR 7(b)(3)(E) terms due to the deefendant's late service pf the responsive pleadings to this motion pursuant to KCLR 7(b)(3)(C).~~ Plaintiff motion for terms is denied. SG

1.2. ~~There is no legal or factual basis underlying~~ defendant's motion for terms ~~and it~~ is denied. SG

2.3. The plaintiff's motion to amend the complaint to substitute the Chapter 7 Bankruptcy Trustee Michael A. Grassmueck, Inc. for Joan Melnik as the real party in interest herein is GRANTED. Michael A. Grassmueck, Inc. is substituted for Joan Melnik as the



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plaintiff ~~and the amendment shall relate back to the date the original complaint was filed~~. SG

3.4. The plaintiff's motion to amend the case caption is GRANTED. In all future pleadings, the parties shall utilize the following case caption:

~~MICHAEL A. GRASSMUECK, INC.~~, as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,

Plaintiff,

vs.

TIMOTHY McSHANE and JULIE S. McSHANE, husband and wife and the marital community composed thereof,

Defendants.

* **The Clerk is directed to amend the record of this case to reflect the change in the party plaintiff from Johan Melnik to Michael A. Grassmueck, Inc.**

4.5. The plaintiff's motion to stay the defendant's motion to vacate the default judgment previously entered is GRANTED. The defendant's pending motion to vacate the default judgment herein is hereby STAYED for a period of 90 days from the date of this order in order to permit both parties to conduct discovery. The court will consider extending this stay beyond 90 days upon the motion of either party if discovery is not completed despite the best efforts of counsel in expediting the discovery process.

5.6. It is further ORDERED that any action to execute upon the existing default judgment is STAYED pending the completion of discovery and the court's ruling on the defense motion to vacate said judgment.

6.7. OTHER:



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DATED: Oct 13th, 2008.

JUDGE STEVEN GONZALEZ

Presented by:

Tim Callahan, WSBA #18490
Attorney for Plaintiff Joan Melnik and
Chapter 7 Trustee Michael A. Grassmueck, Inc.

Copy received, approved for entry and notice of Presentation waived by:

McGAUGHEY BRIDGES DUNLAP, PLLC

Shellie McGaughey WSBA #16809
Attorney for Defendants McShane



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600 First Avenue
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

| | |
|---|---|
| MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,<br><br>Plaintiff,<br><br>vs.<br><br>TIMOTHY C. MCSHANE and JULIE S. MCSHANE, husband and wife, and the marital community comprised thereof,<br><br>Defendants. | NO. 05-2-19294-1SEA<br><br>~~[PROPOSED]~~<br>**ORDER GRANTING DEFENDANT'S MOTION TO STRIKE**<br>. |

This matter came on regularly for consideration before the Court on defendant Timothy McShane's Motion to Strike Plaintiff's CR 17 (A) Request for Relation Back, and the Court having reviewed and considered the following pleadings:

1. Defendant's Motion to Reconsider;

2. Plaintiff's Reply to Defendant CR 59(a)(7)(9) Motion and Plaintiff CR 17(a) Request for Relation Back;

3. Defendant's Motion to Strike;

4. _____;

5. _____;



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325 – 118th Avenue Southeast, Suite 209
Bellevue, Washington 98005 – 3539
(425) 462 – 4000
(425) 637 – 9638 Facsimile

6. _____;

7. This proposed order;

and being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED as follows:

Defendant's Motion to Strike is GRANTED. The Court will accordingly not consider plaintiff's request for relation back under CR 17(a) and plaintiff's CR 17(a) Request is hereby STRICKEN.

Dated this 22nd day of May, 2009.

Judge Steven González

Presented by:
McGAUGHEY BRIDGES DUNLAP, PLLC

SHELLIE MCGAUGHEY, WSBA #16809
Attorneys for Defendant McShane

Approved for entry: Notice of Presentation Waived:
LAW OFFICE OF TIM CALLAHAN

Tim Callahan, WSBA #18490
Attorney for Plaintiff



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

| | |
|---|---|
| MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,<br><br>Plaintiff,<br><br>vs.<br><br>TIMOTHY C. MCSHANE and JULIE S. MCSHANE, husband and wife, and the marital community comprised thereof,<br><br>Defendants. | NO. 05-2-19294-1SEA<br><br>~~[PROPOSED]~~<br>**ORDER GRANTING DEFENDANT'S MOTION TO RECONSIDER** |

This matter came on regularly for consideration before the Court on defendant Timothy McShane's Motion to Reconsider the decision not to vacate the default judgment entered against him, and the Court having reviewed and considered the following pleadings:

1. Defendant McShane's Motion to Reconsider;
2. Plaintiff's Reply (sic);
3. Defendant's Reply + Declaration; and
4. Defendant's Motion to Strike;
5. This proposed order;





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and being fully advised in the premises, it is hereby ORDERED, ADJUDGED and DECREED as follows:

Defendant's Motion for Reconsideration is GRANTED. This Court's Order denying Defendant McShane's Motion to Vacate the Default Judgment is hereby VACATED. Defendant's Motion to Vacate the Default is GRANTED.

Dated this 22nd day of May, 2009.

/s/
Judge Steven González

Presented by:
McGAUGHEY BRIDGES DUNLAP, PLLC

DMT for #40979
SHELLIE MCGAUGHEY, WSBA #16809
Attorneys for Defendant McShane

Approved for entry: Notice of Presentation Waived:
LAW OFFICE OF TIM CALLAHAN

Tim Callahan, WSBA #18490
Attorney for Plaintiff



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**ORIGINAL**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

| | |
|---|---|
| MICHAEL A. GRASSMUECK, INC., as Chapter 7 Trustee for the Bankruptcy Estate of Joan Melnik,<br><br>Plaintiff,<br><br>v.<br><br>Timothy C. McShane and Julie S. McShane, husband and wife and the marital community composed thereof,<br><br>Defendants. | NO. 05-2-19294-1SEA<br><br>ORDER ~~GRANTING~~ Denying PLAINTIFF RECONSIDERATION MOTION REINSTATING THE DEFAULT JUDGMENT AND CR 17(a) RELATION BACK |

THIS MATTER came before the court on plaintiff's motion for reconsideration and plaintiff request for grant of relation back pursuant to CR 17(a);

The court having considered:

A. Plaintiff Motion for Reconsideration and CR 17(a) Relation Back;

~~B. Defendant Response to Plaintiff Motion for Reconsideration and~~ CR 17(a) Relation Back;

C. Plaintiff Reply to Defendant Response to Plaintiff Motion for Reconsideration and CR ~~17(a)~~ Request for Relation Back;

D. ~~Plaintiff [Proposed] Order Granting Plaintiff Motion to Reconsider and Reinstate Default Judgment and CR 17(a) Relation Back.~~

SC

Tim Callahan, WSBA #18490
ATTORNEY AT LAW
600 1st Avenue-Suite 414 A
Seattle WA 98104-2237
(206)783-4104

Based on the foregoing ~~and good cause appearing,~~ it is hereby ORDERED, as follows:

1. Plaintiff motion for reconsideration is denied. ~~GRANTED and the Default Judgment is REINSTATED;~~

~~2. Plaintiff is hereby GRANTED~~ CR 17(a) relation back;

~~3. Other:~~

_____

_____

DATED this 2nd day of June, 2009.

Judge Steven ~~Gonzalez~~

~~Presented by:~~

Tim Callahan WSBA #18490
Plaintiff Attorney

Approved for entry; Notice of Presentation Waived:

_____
Shellie McGaughey WSBA #16809
Defendant Attorney



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